82-1006

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a company discriminates against male employees in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing an employee health insurance plan that offers coverage for medical expenses of spouses, except for their pregnancies.

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In the Supreme Court of the United States

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 680 F.2d 1243. The orders of the district court (App. B, *infra*, 10a–11a; App. C, *infra*, 12a–13a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 14a) was entered on July 6, 1982, and a petition for rehearing (App. E, *infra*, 15a) was denied on September 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 701(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. IV) 2000e(k) provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Subsection 10(b) of the EEOC's Guidelines on Discrimination Because of Sex (29 C.F.R. 1604.10(b)) provides in pertinent part:

> Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as * * * payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities. * * *

Questions and Answers Nos. 21 and 22 (29 C.F.R. Part 1604 App.) explain this regulation as follows:

> 21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of all the dependents of all employees?
>
> A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.
>
> But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.
>
> 22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

STATEMENT

1. Congress enacted the Pregnancy Discrimination Act of 1978 ("PDA"), Pub. L. No. 95-555, 92 Stat. 2076 *et seq.*, in response to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), which held that pregnancy-related classifications did not, on their face, constitute sex-based classifications under Title VII. The PDA amended the "Definitions" section of the Title (Section 701) to add subsection (k), which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions * * *" (42 U.S.C. (Supp. IV) 2000e(k)).[1]

Within seven months after the PDA's passage, the Equal Employment Opportunity Commission revised its Guidelines on Discrimination Because of Sex to reflect changes required by the Act. The final Guidelines,

[1] The complete text of the new definition is reprinted at page 2, *supra*.

and an Appendix of 37 Questions and Answers, were published on April 20, 1979. 44 Fed. Reg. 23804–23809, codified at 29 C.F.R. Part 1604 & App. The Answers to Questions 21 and 22 set forth the Commission's position that Title VII, as amended by the PDA, requires that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions" (26 C.F.R. Part 1604 App., Answer No. 21; see page 3, *supra*.).[2]

2. Respondent offered an employee health insurance plan at its Sunnyvale City, California, facility that provided coverage for all medical conditions of dependants except that it excluded any coverage for pregnancies of any dependents (R. 20 at 2-3; Exh. A at 14-16).[3] On September 14, 1979, Mark Jennings, an employee at Sunnyvale, filed a charge with EEOC alleging that respondents had unlawfully discriminated against him by refusing to provide insurance coverage for his wife's hospitalization due to pregnancy (R. 14 at 2, 20 at 5; Exh. F). After the Commission completed processing of Jennings' charge, it filed an enforcement suit against respondent on October 6, 1980, under Section 706 of Title VII, 42 U.S.C. 2000e-5 (R. 1).

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[2] The guidelines also make clear that an employer is not obliged to provide the same level of health insurance coverage for pregnancy-related expenses of the spouses of male employees as it provides for its female employees. Pages 3–4, *supra*.

[3] The plan was amended effective December 1, 1980 (two months after suit was filed) to provide coverage for the pregnancy of the spouse of an employee on the same basis as any illness (R. 20 at 3). That amendment, of course, does not affect employees who were denied benefits for spousal pregnancies between the effective date of the PDA and December 1, 1980.

The district court granted respondent's motion for summary judgment (App. B, *infra*, 10a-11a) relying on *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 510 F. Supp. 66 (E.D. Va., 1981),[4] and denied a motion for reconsideration (App. C, *infra*, 12a–13a). The court of appeals affirmed (App. A, *infra*, 1a–9a), and also denied a motion for rehearing (App. E, *infra*, 15a).

REASONS FOR GRANTING THE PETITION

The question in this case is identical to that presented in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, cert. granted, No. 82–411 (Dec. 6, 1982), and the decision below is in square conflict with the decision of the Fourth Circuit. As we explain in our brief in response to the petition in *Newport News*[5], that question—whether the amended Title VII permits employers to provide health insurance plans that offer less coverage for pregnancies of spouses than for their other medical expenses—is an important and recurring one, and a uniform national rule is needed. We also explain in our *Newport News* brief why we believe that the court of appeals correctly decided that case. For the same reasons, the decision below is in error.

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[4] That decision was reversed by a panel of the Fourth Circuit (667 F.2d 448 (1982)) and the panel decision was adopted in an en banc opinion (682 F.2d 113 (1982)). *Newport News* is currently pending on certiorari (No. 82-411).

[5] We are sending respondents a copy of that brief.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, No. 82-411, and should then be disposed of as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

MICHAEL N. MARTINEZ
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Equal Employment Opportunity Commission

DECEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT,

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.,
DEFENDANT-APPELLEE.

No. 81-4542

USDC No. CV-80-3833

Filed: July 6, 1982

OPINION

On Appeal from the United States District Court
for the Northern District of California
Hon. William W. Schwarzer, Presiding

Argued and Submitted: May 13, 1982

Before: BROWNING, MERRILL and WRIGHT, Circuit Judges

MERRILL, Circuit Judge:

Appellant Equal Employment Opportunity Commission (EEOC) has charged Appellee Lockheed Missiles & Space Company, Inc., with a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-k). EEOC appeals from summary judgment in favor of Lockheed. The question presented is whether PDA, which concededly applies to women

employees, applies as well to spouses of male employees. The district court held that it did not.[1] We agree.

Section 703(a) of title VII, 42 U.S.C. § 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court held that pregnancy-related classifications did not on their face constitute discrimination on the basis of sex in violation of Title VII. Specifically the Court held that it was not an unlawful employment practice for an employer to provide to its employees a disability insurance program which excluded from its coverage all pregnancy-related disabilities. In so holding, the Court applied principles earlier announced in *Geduldig v. Aiello*, 417 U.S. 484 (1974). There it was held that a California state statutory program for disability benefits which contained such an ex-

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[1] The district court relied on *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 510 F. Supp. 66 (E.D. Va. 1981), which has since been reversed by the Court of Appeals for the Fourth Circuit, 667 F.2d 448 (4th Cir. 1982), and has now been taken for rehearing by the Court of Appeals En Banc (order of April 12, 1982).

clusion did not violate the Equal Protection Clause of the Fourteenth Amendment.

PDA was passed in response to the *Gilbert* decision. It provided in relevant part:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *.

42 U.S.C. § 2000e-k.

Lockheed offered to its employees at no cost a medical benefit plan which, except for pregnancy, covered the medical expenses of the dependents of its employees. EEOC asserts that the effect of the pregnancy exclusion was to discriminate against male employees in violation of § 703(a). It reasons that a plan which denies full coverage for female spouses only because of their sex, denies employment benefits to male employees because of their sex. It argues that by PDA Congress intended to and has completely overruled *Gilbert* and has established that discrimination on the basis of pregnancy, wherever found, is gender-based discrimination. PDA cannot be read so broadly.

The quoted portion of § 2000e-k can be divided into two clauses separated by the semicolon. The first is simply definitional: The word "sex" as used in § 703(a) is to be read to mean "pregnancy, childbirth or related medical conditions." Reading PDA against § 703(a) (1) the latter now provides that it shall be an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation * * * because of *such individual's* * * * pregnancy, childbirth or related medical conditions." (Emphasis

supplied.) The amendment would have the same effect on § 703(a)(2). This can hardly be read to apply to male employees. By choosing the definitional form of amendment, Congress has expressly limited the scope of its action to women employees.

The second clause in its reference to women employees ("employment-related purposes"; "other persons not so affected but similar in their ability or inability to work") clarifies the Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent.

The legislative history of PDA provides further support for this construction of its terms. While it does contain some contradictory expressions on the part of some members of Congress as to what they believed the legislation did or should provide in the way of dependents' benefits,[2] the Senate Committee Report leaves no room for doubt. There it is stated:

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[2] *E.g.*, Senator Bayh, one of the sponsors of the Senate bill that became PDA, at one point spoke to the question of dependents' benefits; not, however, as an expression of the bill's coverage, but as an opinion on the state of court-made law on the subject of sexual discrimination. (This lends support to our conclusion that PDA does not deal with this question and accordingly that it must be resolved under pre-PDA law.) He stated:

> There remains the question, however, of whether dependents of male employees must receive full maternity coverage if the spouses of female employees are provided complete medical coverage. While it is difficult to second-guess the courts, I feel that the history of sex discrimination cases under the 14th amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents will require that if companies choose to provide full coverage to the dependents of their female employees, then they must provide such complete coverage to the dependents of their male employees.

123 Cong. Rec. 29,642 (1977).

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles.

S.Rep. No. 331, 95th Cong., 1st Sess. 5-6 (1977).

Senator Cranston, a cosponsor of the legislation, also spoke to the same question. He expressed his personal opinion that Title VII's sexual discrimination ban extends to spouses of male employees, but acknowledged that the Senate Committee had not taken a position on the question. He stated:

> When the Human Resources Committee considered how S. 995 would affect medical coverage for dependents of employees, the question was raised about the obligation of an employer to pay for the pregnancy-related medical expenses of spouses of employees. The committee presumed that most comprehensive medical plans do cover dependents, and that it was unlikely that any comprehensive plan covering spouses would cover husbands of women employees but not wives of male employees. Thus, the committee did not directly answer the question of whether such plans would be discriminatory under title VII.
>
> Mr. President, I would like to express for the record my own view that such a plan would indeed be discriminatory, and would be prohibited by the title VII sex discrimination ban.

123 Cong. Rec. 29,663 (1977).

In the House, Mr. Sarasin, a supporter of the House bill expressed the view that the bill would extend to wives of male employees. He stated, "I don't think that this is the intent, but I don't see how you can read it any other way." *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor* (Part 1), 95th Cong., 1st Sess. 188 (1977).

It is thus clear that in enacting PDA, Congress had in mind the fact that a question was presented as to dependents' benefits and deliberately chose not to deal with it. The Senate Report explicitly states that the basic purpose of the legislation was to protect women employees; that Congress did not regard the bill as altering the basic principles of Title VII respecting sexual discrimination and intended that those unaltered basic principles would apply in determining dependents' benefits. In the eyes of Congress then, PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees.[3]

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[3] While EEOC's position finds support in the Commission's Final Interpretive Guidelines on Sex Discrimination published at 44 Fed. Reg. 23804 *et seq.* (1979) (29 C.F.R. § 1604. 10 and appendix (1981)), the language of the introduction to the Guidelines echoes the Senate Report and undercuts the substance of the text of the Guidelines. In response to its illustrative Question 21 the Commission in its Guidelines stated that "if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions." Normally interpretations of a statute by the administrative agency charged with its enforcement are entitled to considerable deference by the courts. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). However the introduction to the Guidelines states:

> To the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve this question of benefits for dependents.

44 Fed.Reg. 23804 (1979). Thus it is clear that EEOC's answer to its Question 21 is not based on a contemporaneous interpretation of PDA but rather on its erroneous view of pre-existing Title VII principles.

As we read *Gilbert* and *Geduldig*, the "basic principle" announced there was that for discrimination to be gender-based the line between the favored and disfavored groups must be drawn strictly on lines of gender: male versus female. In applying this basic principle to the exclusion of pregnancy from a disabilities benefits plan, *Gilbert* approvingly read *Geduldig* as holding that such an exclusion "is not a gender-based discrimination at all." 429 U.S. at 136. With respect to what constitutes gender-based discrimination, *Gilbert* quotes *Geduldig* extensively:

> "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure." 417 U.S. at 494. Quoted at 429 U.S. p. 134.
>
> * * *
>
> "The lack of identity between the excluded disability and gender as such * * * becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." 417 U.S. at 496-497 n.20. Quoted at 429 U.S. p. 135.
>
> * * *
>
> "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496-497. Quoted at 429 U.S. p. 135.

We conclude that under basic principles of Title VII, as they existed prior to PDA, exclusion of pregnancy-related medical expenses of spouses of male employees was not gender-based discrimination in violation of § 703(a) of Title VII. We further conclude that PDA did not change those principles.

JUDGMENT AFFIRMED.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.

No. 81-4542

Wright, Specially Concurring.

I concur in the result but write separately because I believe that neither the PDA nor *Gilbert* answers the question posed here.

The majority concludes correctly that Congress adopted the PDA to clarify that female employees and job applicants could not be discriminated against on the basis of pregnancies or ability to become pregnant. The PDA reversed the decision in *Gilbert* that employers could discriminate against females with regard to opportunities on the basis of pregnancy.

That the PDA refers only to employees or applicants is intuitive because the purpose of Title VII, obviously, is to provide equal employment opportunities. That the PDA does not answer the question here is clear from the legislative history quoted by the majority at page four. We are not concerned with employment opportunities of female spouses.

What we must decide is whether Lockheed denies its male employees a health benefit plan equivalent to that given its female employees and, if so, whether the denial is based on impermissible sex discrimination. For our purposes, it is irrelevant that dependents' pregnancies are the excluded risk. The exclusion could be breast cancer. Our focus is properly on the effect of the exclusion on the employee because it is his compensation and terms of employment Title VII protects from unlawful discrimination. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

Lockheed's plan insures employees against some risks associated with the health of their *dependents*,

who are spouses, children under 19, and those over 19 under limited circumstances. Dependents' pregnancies are excluded from the list of risks covered.

This exclusion affects both male and female employees. While a male employee bears the cost of his spouse's pregnancy, a female employee bears the cost of her daughter's pregnancy. The coverage of risks for the two groups (females with dependents and males with dependents) is equivalent. The value of the coverage and the cost of the pregnancy exclusion may vary among individual employees, but this is a necessary incident to group health insurance, as the Court noted in *Manhart*. *Id*. at 710.

The exclusion is facially neutral and nothing before us indicates that it has an adverse impact on Lockheed's male employees. Even if some adverse impact were shown, the Court stated in *Manhart* that "a completely neutral practice will inevitably have some disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Id*. at 711, n.20.

This case does not involve total denial of dependent coverage to employees of one sex as in *Wambheim v. J.C. Penney Co., Inc.*, 642 F.2d 362 (9th Cir. 1981). Nor must we decide whether denying pregnancy coverage to *spouses*, rather than to *dependents*, discriminates against male employees. The exclusion here applies to and affects both male and female employees. I see no unequal treatment or discrimination in the plan as provided.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF,

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.,
DEFENDANT.

Civ. No. C 80 3833 WWS

Filed: July 6, 1981
ORDER AND JUDGMENT

Plaintiff Equal Employment Opportunity Commission having moved for partial summary judgment and defendant Lockheed Missiles & Space Company, Inc. having moved for summary judgment, both pursuant to Federal Rule of Civil Procedure 56; and

Said motions having come on for hearing before the Court on June 26, 1981, the matters raised therein having been fully briefed and argued by the respective parties and fully considered by this Court and it appearing from the affidavits, memoranda, argument of counsel, and documents on file herein, that no genuine issue exists as to any material fact and that, for the reasons set forth in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, ___ F. Supp. ___, 25 FEP Cases 5 (E.D. Va. 1981), the defendant is entitled to judgment as a matter of law; it is therefore

ORDERED, ADJUDGED AND DECREED as follows:

1. The motion of plaintiff Equal Employment Opportunity Commission for partial summary judgment shall be and is hereby denied.

2. The motion of defendant Lockheed Missiles & Space Company, Inc. for summary judgment shall be and is hereby granted.

3. Judgment shall be and is hereby entered in favor of defendant Lockheed Missiles & Space Company, Inc. and against plaintiff Equal Employment Opportunity Commission and this cause and the Complaint herein are hereby dismissed with prejudice.
Dated: 6 JUL 1981

WILLIAM W. SCHWARZER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF,

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.,
DEFENDANT.

NO. C-80-3833-WWS

Filed: August 10, 1981

ORDER

The EEOC has moved for reconsideration on the ground that the legislative history shows an intention to require coverage of pregnancy-related expenses of employees' wives, and that evidence suggesting a contrary conclusion only indicates Congress' unwillingness to extend disability coverage to dependents. The EEOC's own evidence will not support this contention.

The EEOC relies on the technical distinction between medical and disability benefits. But the evidence submitted indicates that Congress never drew such a distinction. Senator Javits' letter, and Senator Cranston's remarks on the floor, both show that the question of medical benefits for dependents was never considered as an independent issue. The EEOC cites a dialogue between Senator Hatch and Mr. Lazarescu, indicating that Senator Hatch did not understand the distinction. The Court might reasonably conclude that Senator Hatch also did not draw this distinction in his colloquy with Senator Williams.

The record suggests that Senator Hatch wished, and Congress intended, to protect working women from discrimination and hardship without unnecessary expense to employers. It is clear that the bill was not intended

to require that pregnancy benefits be provided to employees' wives. Thus the following statements were made by administration witnesses testifying in favor of the bill:

Assistant Attorney General Days:

> The bill is to equalize opportunities for employees. It is to make certain that they are not disadvantaged in the work force by certain discriminations with respect to disabilities. I don't understand that you reach dependents and whatever coverage there might be of dependents under plans.

Ms. Jenkins:

> For purposes of Title VII, the definition that H.R. 5055 puts into and that is included in the amendment would only apply to benefits for employees of the employer.

Inasmuch as it is abundantly clear that the amendment was not intended to reach dependents, there is no need to address the other arguments advanced by the EEOC.

The motion is denied.

IT IS SO ORDERED.

DATED: August 7, 1981

WILLIAM W. SCHWARZER
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4542
DC CV 80-3833 WWS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT,

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.,
DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Northern District of California.

This Cause came to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 6, 1982.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLANT,

v.

LOCKHEED MISSILES & SPACE COMPANY, INC.,
DEFENDANT-APPELLEE.

NO. 81-4542

Filed: September 27, 1982

ORDER

Before: BROWNING, MERRILL and WRIGHT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Browning and Wright have voted to reject the suggestion for rehearing en banc. Judge Merrill has recommended that the suggestion be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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No. 82-1006

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

VS.

LOCKHEED MISSILES & SPACE COMPANY, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Did an employer violate Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, by providing its employees with a health insurance plan which covered dependents but excluded coverage for pregnancies of dependents?

PARTIES

Petitioner, Equal Employment Opportunity Commission, and Respondent, Lockheed Missiles & Space Company, Inc., were the only parties to the proceedings before the United States Court of Appeals for the Ninth Circuit*. Lockheed Missiles & Space Company, Inc., a corporation, is a wholly-owned subsidiary of Lockheed Corporation.

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*The Equal Employment Advisory Council also participated in the Ninth Circuit proceedings as *Amici Curiae* urging affirmance of the decision of the district court.

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No. 82-1006

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

VS.

LOCKHEED MISSILES & SPACE COMPANY, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

Petitioner has prayed that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. Petitioner has also requested that the petition for a writ of certiorari be held pending this Court's decision in *Newport News Shipbuilding & Drydock Co. v. EEOC*, *cert. granted*, No. 82-411 (December 6, 1982) because of the similarity of issues involved in these two cases. Respondent recognizes that the conflict between the Fourth and Ninth Circuit Courts of Appeals warrants holding this case pending the outcome of *Newport News*. Respondent urges, however, that the decision below of the Ninth Circuit is correct. Thus, the Court should reverse the decision of the Fourth Circuit in *Newport News* and thereafter deny the petition for writ of certiorari in the instant case.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. A, 1a-9a) is reported at 680 F.2d 1243. The orders of the district court (Pet. App. B & C, 10a-13a) are not reported.

JURISDICTION

The judgment of the Ninth Circuit (Pet. App. D, 14a) was entered on July 6, 1982, and a petition for rehearing (Pet. App. E, 15a) was denied on September 27, 1982. The Court has jurisdiction to review this matter under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Statutes, regulations, and guidelines of the Equal Employment Opportunity Commission ("EEOC") involved in this matter are set forth in the petition at pages 2 through 4.

STATEMENT OF THE CASE

This lawsuit challenges one of Respondent's employee health insurance programs, the Lockheed Medical Benefit Plan (hereinafter "the Plan"), because formerly it generally covered medical conditions of dependents, but excluded coverage for most expenses for pregnancies of dependents.[1] Petitioner contends that the exclusion of pregnancy coverage for dependents discriminated against

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[1] Respondent has always provided one or more other employee health insurance programs at no cost to its employees which covered pregnancies of dependents. The challenged health plan also provided coverage for dependent spouses for complications of pregnancy resulting in intra-abdominal surgery. Respondent has provided coverage for spousal pregnancy under all employee health insurance programs since December 1, 1980.

Respondent's male employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1976) (hereinafter "PDA"), by denying such employees coverage for their spouses' pregnancies while generally covering medical conditions of the spouses of female employees. The validity of Petitioner's theory is presently at issue before this Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC, cert. granted,* No. 82-411.

In the instant case, the district court granted Respondent's motion for summary judgment relying on the reasoning of the district court in *Newport News Shipbuildng & Dry Dock Co. v. EEOC,* 510 F. Supp. 66 (E.D. Va. 1981), *reversed* 667 F.2d 448 (1981), *cert. granted,* No. 82-411 (December 6, 1982).

The district court in *Newport News* had held that an analogous employee health benefit program was not discriminatory on its face and that, there was no showing that the plan, by limiting reimbursement for the pregnancy-related expenses of spouses of male employees, had caused any gender-based effect in violation of Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1). 510 F. Supp. at 71. In reaching this conclusion, the district court found that the PDA changed the law under Title VII, as interpreted in this Court's decision in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), only with respect to female employees. Thus, the district court held that *Gilbert* still applied to the issue of dependent's benefits.

The district court in the instant case denied Petitioner's motion for reconsideration and, in the process, reiterated its view that the PDA does not apply to dependents. (Pet. App. C, 13a).

The Court of Appeals for the Ninth Circuit affirmed unanimously. In so ruling, the Ninth Circuit held that the "PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees," and, thus, that the basic principles of *Gilbert* survived the PDA to control the question of dependent's pregnancy benefits. 680 F.2d at 1246.[2] In support, the Ninth Circuit noted that the first clause of the PDA, Section 701(k) of Title VII, 42 U.S.C. § 2000e(k), is simply definitional; alone, it does not prohibit anything. Rather, it provides that the word "sex" in the prohibitory sections of Title VII is to be read to mean "pregnancy, childbirth or related medical conditions." When read with § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), the applicable prohibitory section of Title VII, it can be observed that the first clause of the PDA only applies to female employees. "§ 703(a)(1) now provides that it shall be an unlawful employment practice for an employer to 'discriminate against any individual with respect to his compensation . . . because of *such individuals*' . . . pregnancy, childbirth or related medical conditions." 680 F.2d at 1245 (emphasis in original).

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[2]While Judge Wright agreed with the majority's holding that the PDA does not apply to spousal benefits, he concurred specially on the ground that Respondent's health plan involved no unequal treatment or discrimination because it denied pregnancy benefits to dependents of both male and female employees. 680 F.2d at 1247 (Wright, J., specially concurring).

The Ninth Circuit also noted that the "second clause [of § 701(k)] in its reference to women employees ('employment-related purposes'; 'other persons not so affected but similar in their ability or inability to work') clarifies Congressional intent by restating the substance of the first clause in other than definitional terms, and making it clear that its limitation to employees was not inadvertent." 680 F.2d at 1245.

Finally, the court observed that the legislative history further supports a construction of the statute limiting its application to female employees. Specifically, the court quoted from the Senate Committee Report which made

> clear that in enacting PDA, Congress had in mind the fact that a question was presented as to dependents' benefits and deliberately chose not to deal with it. The Senate Report explicitly states that the basic purpose of the legislation was to protect women employees; that Congress did not regard the bill as altering the basic principles of Title VII respecting sexual discrimination and intended that those unaltered basic principles would apply in determining dependents' benefits.

680 F.2d at 1246. The applicable "basic principles" were those announced in *Gilbert*, and under *Gilbert* the "exclusion of pregnancy-related medical expenses of spouses of male employees was not gender-based discrimination in violation of § 703(a) of Title VII." 680 F.2d at 1247.

Petitioner's motion for rehearing was denied and its suggestion for a rehearing en banc was rejected by order dated September 27, 1982. (Pet. App. E, 15a).

ARGUMENT

Petitioner correctly asserts that the decision below is in conflict with the decision of the Fourth Circuit in *Newport News Shipbuilding & Dry Dock Co. v. EEOC, supra,* 667 F.2d 448, *cert. granted,* No. 82-411. For the reasons offered by the Ninth Circuit and set forth in the Petition for a Writ of Certiorari by Newport News Shipbuilding & Dry Dock Company, Respondent believes that the Ninth Circuit correctly decided the instant case.

The PDA does not apply by its terms or by Congressional intent to dependent's benefits. The definitional first clause of § 701(k) read against § 703(a)(1) cannot apply to male employees since § 703(a)(1) as defined by § 701(k) can only protect employees who have the capacity to become pregnant. The second clause of § 701(k) with its references to "employment-related purposes" and "ability or inability to work" necessarily contemplates that the pregnant person afforded protection thereunder is an employee.

The legislative history of the PDA confirms that it does not apply to dependent's benefits. As the Ninth Circuit noted, the Senate was conscious of the question of dependents' benefits and concluded that it would be answered on the basis of Title VII principles apart from the PDA.[3]

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[3]The Senate Report stated:

> Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that ***the basic purpose of this bill is to protect women employees,*** it does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII purposes. Therefore, ***the question in regard to dependent's benefits would be determined on the basis of existing Title VII principles.***

While the Ninth Circuit found it unnecessary to search further for indicia of Congressional intent, it should also be noted that Senator Harrison Williams, chief sponsor and spokesperson for the PDA in the Senate, in a dialogue on the Senate floor with Senator Hatch, expressly stated that the PDA did not cover dependents.[4] Senator Williams'

S. Rep. No. 95-331, 95th Cong., 1st Sess. (July 6, 1977), 5-6, *reprinted in* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978* (hereinafter *"Legislative History"*), 42-43 (emphasis added).

The EEOC, in the introduction to its guidelines on the PDA, paraphrased the Senate Report:

> To the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve this question of benefits for dependents. (S. Rep. No. 91-331 at 6.)

Final Interpretative Guidelines to the Pregnancy Discrimination Act of 1978, 44 Fed. Reg. 23804 (April 20, 1979). The EEOC has, of course, entirely reversed its position on the applicability of the PDA to the issue of dependents' pregnancy benefits and on the meaning of the legislative history of the PDA.

[4]Mr. HATCH: *The phrase "women affected by pregnancy, childbirth or related medical conditions," . . . appears to be overly broad,* and is not limited in terms of employment. It does not require that the person so affected be pregnant.

Indeed, under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. One might even argue that other female dependents are covered. And what about the status of a woman coworker who is not pregnant but rides with a pregnant woman and cannot get to work once the pregnant female commences her maternity leave or the employed mother who stays home to nurse her pregnant daughter? Are they women "affected by" pregnancy?

Could the sponsors clarify exactly whom that phrase intends to cover?

other legislative comments on the PDA, as well as the statements of other legislators make clear the limited purpose of the PDA to protect female employees, not spouses or other dependents.[5]

Mr. WILLIAMS: If there is an ambiguity, with regard to income maintenance plans, I cannot see it. ". . . shall be treated the same for all employment-related purposes." I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and *if there is any ambiguity, let it be clear here and now that this is very precise. It deals with a woman, a woman who is an employee,* an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee.

Mr. HATCH: OK; or the effects on other people as a result of the pregnancy of a female employee.

Mr. WILLIAMS: Exactly. It does not.

123 Cong. Rec. S15,038-39 (1977) (remarks of Sen. Williams and Sen. Hatch) (Legislative History 80) (emphasis added).

[5]Thus, Senator Williams said upon introducing the PDA, "*[W]orking women* throughout our Nation from varied walks of life are in need of relief." 123 Cong. Rec. S4-142-43 (1977) (remarks of Sen. Williams) (Legislative History 4) (emphasis added.) During the final floor debate he declared:

> The central purpose of the bill is to require that *women workers* be treated equally with other *employees on the basis of their ability or inability to work.* . . .

123 Cong. Rec. S14,989 (1977) (remarks of Sen. Williams) (emphasis added). Repeated through the House and Senate Reports is the statement that the PDA would only require that "pregnant women be treated the same as other employees on the basis of their ability or inability to work." H. Rep. No. 95-948, 95th Cong., 2d Sess. (March 13, 1978) (Legislative History 150); S. Rep. No. 95-331 (Legislative History 41). See also H. Rep. No. 95-948, *supra,* (Legislative History 159) and S. Rep. No. 95-331, *supra,* (Legislative History 51).

CONCLUSION

While Respondent believes the decision below is correct,[6] it recognizes, of course, that this Court will be considering that question in deciding the *Newport News* case. It is therefore appropriate to hold this case pending decision

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[6]In the unlikely event that this Court should resolve the conflict between the Fourth and Ninth Circuits in favor of the position of the Fourth Circuit, this case should be remanded for further consideration by the lower courts. Two arguments, as yet unaddressed by the district court or the majority court of appeals panel, support the judgment below.

First, there is the conclusion of Judge Wright in his special concurrence that Respondent's plan did not involve discrimination or unequal treatment at all because the exclusion of pregnancy benefits for dependents affected male and female employees equally. 680 F.2d at 1248. Certainly the exclusion was facially neutral and the coverage of risks was equal. Moreover, it has never been shown, nor has Petitioner ever offered to show that Respondent's plan economically benefited female employees disproportionately.

Alternatively, the judgment below is correct because Respondent provided pregnancy benefits to spouses of male employees at the option of the employees. At all relevant times, Respondent offered at no cost to its employees a choice of health plans. All plans included dependent coverage and, only one plan excluded pregnancy coverage. Thus, Respondent provided to its employees a benefit program offering a range of options. Some health plans offered full prepaid care; others had deductibles and coinsurance payments. These plans also provided other differences in coverages, in addition to the exclusion of dependent pregnancy benefits from one of them. From all that it appears in the record, Respondent provided its employees with a package of options affording equal treatment in potential risk coverage.

in that one. Respondent, therefore, does not oppose holding the petition, but urges the Court to reverse the *Newport News* case and thereafter to deny this petition.

Respectfully submitted,

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